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Supreme Court, U.S.
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No. 08-1231

IN THE

Supreme Court of the United States

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*,

Petitioners,

v.

EVON BILLUPS, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONERS

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PARTIES TO THE PROCEEDINGS BELOW

The Petitioners are The National Association for the Advancement of Colored People (NAACP), Inc., through its Georgia State Conference of Branches; Eugene Taylor; and Bertha Barrett Young. The following were plaintiffs in the proceedings below until August 24, 2007, and are not Petitioners: Common Cause/Georgia; League of Women Voters of Georgia, Inc.; Central Presbyterian Outreach and Advocacy Center, Inc.; Georgia Association of Black Elected Officials, Inc.; Georgia Legislative Black Caucus; Concerned Black Clergy of Metropolitan Atlanta, Inc.; Tony Watkins; and Clara Williams.

The Respondents are Ms. Evon Billups, Superintendent of Elections for the Board of Elections and Voter Registration for Floyd County and the City of Rome, Georgia; Ms. Tracy Brown, Superintendent of Elections of Bartow County, Georgia; Mr. Gary Petty, Member of the Board of Elections and Registration of Catoosa County, Georgia; Ms. Michelle Hudson, Member of the Board of Elections and Registration of Catoosa County, Georgia; Ms. Amanda Spencer, Member of the Board of Elections and Registration of Catoosa County, Georgia; Cathy Cox, former Secretary of State of Georgia and former Chair of the Georgia Election Board in her individual capacity; Karen C. Handel, individually, and in her official capacity as Secretary of State of Georgia and Chair of the Georgia Elections Board; and the State Election Board. All Respondents were defendants below.

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REPLY BRIEF FOR THE PETITIONERS

The State has ignored Rule 10(c) in its opposition. Rule 10(c) provides for review by certiorari when a "court of appeals ... has decided an important federal question in a way that conflicts with relevant decisions of this Court."

In ruling that "*Anderson* does not require any evidentiary showing or burden of proof to be satisfied by the state government...." (554 F.3d at 1353), the court of appeals plainly did not apply the heightened sliding scale standard of review mandated by *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983), *Norman v. Reed*, 502 U.S. 279, 288-89 (1992), *Burdick v. Takushi*, 504 U.S. 428, 434(1992), and most recently in *Crawford v. Marion County Bd. of Elections*, 553 U.S. __, 128 S. Ct. 1610, 1616 (2008). The ruling also conflicts directly with the line of cases represented by *Harris v. McRae*, 448 U.S. 297, 312 (1980), cited at pages 7-8 of the petition, which hold that, unlike other statutes, statutes that infringe fundamental rights are presumed to be unconstitutional and the burden is on the state to prove that the burden imposed by such statutes is both necessary and justified.

The state is also incorrect in asserting that all issues concerning the validity of state photo ID statutes were conclusively resolved in favor of such statutes in *Crawford*. The State has continued to ignore the fact that the three justices who concurred in the lead opinion in *Crawford* stated repeatedly that they were voting to uphold the Indiana photo ID act ***only*** as against a purely facial challenge to its validity. 128 S. Ct. at 1615 ("[T]he evidence in the record is not sufficient to support a facial attack on

the validity of the entire statute, and thus we affirm."). *See also Id.* at 1623.

The state argues that the Indiana statute was "more restrictive" than the Georgia act. That is only a half-truth, and is irrelevant. *Crawford* held that any burden, however slight, must be justified. *Id.* at. 1616.[1]

The State further argues that the Georgia voters who do not have a photo ID are not denied the right to vote because they have the option of casting an absentee ballot which requires no photo ID. The district court specifically found based on testimony at a preliminary injunction hearing, however, "that absentee voting simply is not a realistic alternative to voting in person that is reasonably available for most voters who lack Photo ID." *Common Cause v. Billups*, (*Common Cause I*) 406 F. Supp. 2d 1326, 1365 (N.D. Ga. 2005), and *see Id.*, n. 7 ("Georgia's Photo ID requirement places the burden of voting

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[1] While Georgia allows voters to use a wider range of documents to obtain a voter ID than Indiana, the Indiana statute gives those who cast provisional ballots ten days to produce a photo ID; in contrast, the Georgia statute allows those who cast provisional ballots only two days to obtain a voter ID to have their provisional ballots counted. In Indiana, residents of nursing homes are allowed to vote on site without a photo ID; the Georgia act contains no similar exception. In Indiana, voters who are indigent can cast a ballot without a photo ID by completing an affidavit of indigency; Georgia law does not contain a comparable indigency exemption from its photo ID requirement.

absentee on the very class of voters who will be least likely to navigate that method of voting successfully."). Moreover, the relevant question under *Anderson* is not whether the Georgia act denies any voter the right to vote, but whether the act imposes an "undue burden" on their right to vote that is not "justified" by a legitimate state interest that made it "necessary" to burden the voters' rights. *Anderson,* 460 U.S. at 789.

The State places great emphasis, as did the district court, on the fact that the Secretary of State (at the district court's urging) conducted an "educational" campaign to inform voters that they would not be allowed to cast ballots in person at the polls without a photo ID. This argument misses the point. While absence of fair notice would be an additional ground for challenging an otherwise valid photo ID requirement, no amount of notice can validate a photo ID requirement that is not necessary, or which was enacted for an improper and purely partisan purpose to discourage poor, elderly and minority voters from voting.

Finally, the State's assertion that there was no record evidence that the Georgia photo ID requirement has an adverse impact on hundreds of thousands of registered voters, a disproportionate share of whom are African-American, is demonstrably untrue. While it is true, as the district court found, that the initial data match that was prepared in 2006 by the Department of Driver Services at the request of then Secretary of State Cathy Cox contained errors (including the name of the district judge himself) (*Common Cause v. Billups* (*Common Cause IV*), 504 F. Supp. 2d 1333, 1361-62 (N.D. Ga. 2007) (Findings # 133-136), that was not

true of the subsequent data match on which both the State and Petitioners relied at the permanent injunction hearing. That subsequent data match was prepared a year later by the State DDS at the request of Republican Secretary of State Karen Handel, and the Republican-controlled State Election Board, and this later more reliable data-match is the one that was introduced at the final hearing by both the Petitioners (PX 99) and by the State Defendants (DX 38). *Common Cause IV*, 504 F.Supp.2d at 1361-62 (Findings # 140-151).

CONCLUSION

This case presents a question of compelling importance: Whether a state has any burden to prove that the burden imposed on voters by a photo ID requirement is both "justified by relevant and legitimate state interests" that are both (1) "sufficiently weighty" (*Crawford*, 128 S. Ct. at 1616) to outweigh its impact on voters, and (2) make it "necessary" to burden the plaintiffs' rights (*Anderson*, 460 U.S. at 789 emphasis added – or, whether, as the court of appeals held, a state is not required to make "any evidentiary showing or [carry any] burden of proof" (554 F.3d at 1353). The answer to this question will dictate the outcome of future challenges to photo ID statutes that are now being proposed as partisan measures in other states.

Respectfully Submitted,

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